

Agency Name: Consumer Affairs

Statutory Authority: 37-6-104, 37-6-402, 37-6-403, 37-6-506, and 58-27-2660

Document Number: 4994

Proposed in State Register Volume and Issue: 44/9

Status: Proposed

Subject: Sale or Lease of Renewable Energy Facilities

History: 4994

<u>By</u>	<u>Date</u>	<u>Action Description</u>	<u>Jt. Res. No.</u>	<u>Expiration Date</u>
-	09/25/2020	Proposed Reg Published in SR		

Document No. 4994
DEPARTMENT OF CONSUMER AFFAIRS
CHAPTER 28

Statutory Authority: 1976 Code Sections 37-6-104, 37-6-402, 37-6-403, 37-6-506, and 58-27-2660

28-78. Sale or Lease of Renewable Energy Facilities. (New)

Preamble:

The South Carolina Department of Consumer Affairs proposes to promulgate R.28-78 to provide consumer protection parameters applicable to the sale or lease of renewable energy facilities, including disclosure requirements, pursuant to Section 58-27-2660.

The proposed regulation will require legislative review.

Notice of Drafting for the proposed regulation was published in the *State Register* on December 27, 2019. The first proposed regulation (Document No. 4959) was published in the *State Register* on February 28, 2020. This proposed regulation incorporates changes based on comments received.

Section-by-Section Discussion

28-78(A) Definitions

Adds new text with reference to Title 37 definitions and additional definitions.

28-78(B) Marketing

Adds new text related to marketing practices and disclosures.

28-78(C) Agreements

Adds new text related to requirements and related disclosures when entering into a renewable generation facility agreement with a consumer.

28-78(D) Right to Cancel

Adds manner by which a consumer may cancel an agreement.

28-78(E) Due Diligence Requirements

Adds new text requiring a retailer to exercise due diligence in the construction/ installation process and utilization of third-party servicers.

28-78(F) Recordkeeping

Adds recordkeeping requirements.

28-78(G) Electronic Delivery of Documents

Adds text outlining the parameters for use of electronic delivery.

28-78(H) Remedies

Adds text regarding the Department's ability to enforce applicable laws, including the regulation.

Notice of Public Hearing and Opportunity for Public Comment:

Interested persons are invited to submit their views in writing to Kelly Rainsford, Deputy Administrator/General Counsel, South Carolina Department of Consumer Affairs, P.O. Box 5757,

Columbia, South Carolina 29250-5757. To be considered, comments must be received no later than 5:00 p.m. on October 26, 2020, the close of the comment period. Should a public hearing be requested, the hearing will be held at the Administrative Law Court on November 9, 2020, at 10:00 a.m., 1205 Pendleton Street, Suite 224, Columbia, S.C. 29201.

Preliminary Fiscal Impact Statement:

Implementation of the regulation will not result in a fiscal impact to the State or its political subdivisions.

Statement of Need and Reasonableness:

DESCRIPTION OF REGULATION: Consumer Protections for the Sale or Lease of Renewable Energy Facilities.

Purpose: The purpose of the regulation is to increase consumer protection by providing uniform marketing and contract disclosure requirements for renewable energy facility retailers and their agents.

Legal Authority: 1976 Code Sections 37-6-104, 37-6-402, 37-6-403, 37-6-506, and 58-27-2660.

Plan for Implementation: The regulation will take effect upon approval by the General Assembly and upon publication in the State Register.

DETERMINATION OF NEED AND REASONABLENESS OF THE PROPOSED REGULATION BASED ON ALL FACTORS HEREIN AND EXPECTED BENEFITS:

Section 58-27-2660(A)(1) requires the Department and the Office of Regulatory Staff to develop consumer protection regulations regarding the sale or lease of renewable energy facilities. The proposed regulation is necessary to provide protections to South Carolina residents buying or leasing renewable energy facilities for a personal, family, or household use. The proposed regulation will ensure that consumer protection measures are undertaken by renewable energy facility retailers and their agents and provide consumers the information needed to make an informed decision.

DETERMINATION OF COSTS AND BENEFITS:

Initial implementation of this regulation will not require additional resources. However, time from staff attorneys and investigators likely will need to be expended in the enforcement process. The regulation permits the Department to retain funds collected in its enforcement of the regulation, which may offset the resources needed as a result of the broadened authority to oversee the renewable energy generation industry. The framework established by the regulation will provide guidance to renewable energy facility retailers and their agents and curb misleading, deceptive, and bad acts or practices. The increased disclosures to consumers and standardization of the agreements will serve to create a more-educated consumer and will provide the ability to shop around and compare renewable energy facilities. This regulation is intended to protect consumers in the renewable energy marketplace while giving due regard to businesses that act honestly and fairly.

UNCERTAINTIES OF ESTIMATES:

While it is hopeful the industry will comply with the regulation, it is possible the Department may need to pursue enforcement of the regulation requirements. Thus, a finite amount of costs is undetermined due to uncertainty in estimating the number of matters that will warrant intervention and the extent to which any litigation will ensue.

EFFECT ON ENVIRONMENT AND PUBLIC HEALTH:

None.

DETRIMENTAL EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH IF THE REGULATION IS NOT IMPLEMENTED:

None.

Statement of Rationale:

Section 58-27-2660(A)(1) provides that the Department and the Office of Regulatory Staff develop such consumer protection regulations, which shall, at a minimum, include appropriate disclosures to be made by sellers and lessors. Sections 37-6-104, 37-6-402, 37-6-403 and 37-6-506 allow the Department to promulgate regulations necessary for the implementation of the South Carolina Consumer Protection Code. It is necessary to promulgate a regulation to set forth the requisite marketing and contractual disclosure provisions needed to ensure consumer protection for the sale or lease of renewable energy facilities.

~~Indicates Matter Stricken~~

Indicates New Matter

Text:

28-78. Sale or Lease of Renewable Energy Facilities.

A. Definitions: Definitions shall be those contained in Title 37 and the following:

(1) "Advertisement" means an oral, written, graphic, or pictorial statement made in the course of soliciting for the sale or lease of a renewable energy facility, including in a newspaper, magazine, on radio, television, or the Internet, or in the form of a mailer or other direct solicitation.

(2) "Consumer" means a purchaser or lessee or prospective purchaser or lessee of a renewable energy facility for a personal, family, or household purpose.

(3) "Lead" means any information identifying a consumer.

(4) "Lead generation" means to:

(a) Initiate consumer interest or inquiry in a renewable energy facility through advertisements;

(b) Engage in the business of selling leads for renewable energy facilities; or

(c) Generate or augment leads for, or refer South Carolina residents to, a third party for renewable energy facilities for a fee, compensation, or gain or expectation thereof.

(5) "Lead generator" means a person engaging in the business of lead generation for the purpose of sale to or benefit of a third party. For purposes of this regulation, the lead generator is an agent of the renewable energy facility retailer purchasing or otherwise benefitting from the lead.

(6) "Lease agreement" means a contract, commitment or document between a consumer and lessor for the exclusive rights to use a renewable energy facility for a period of time in exchange for a payment.

(7) "Purchase agreement" means a contract, commitment or document under which a consumer purchases a residential renewable energy facility from a renewable energy facility retailer.

(8) "Renewable energy facility" means any facility for the production of electrical energy that utilizes a renewable generation resource such as solar photovoltaic and solar thermal resources, wind resources, low impact hydroelectric resources, geothermal resources, tidal and wave energy resources, recycling

resources, hydrogen fuel derived from renewable resources, combined heat and power derived from renewable resources, and biomass resources.

(9) “Renewable energy facility agreement” or “agreement” means a purchase agreement or a lease agreement.

(10) “Renewable energy facility retailer” or “retailer” means a person who:

(a) Sells or proposes to sell a renewable energy facility to a consumer under a purchase agreement;
or

(b) Owns the renewable energy facility that is the subject of a lease agreement.

(11) “Renewable energy facility solicitation” means, for compensation or gain or with the expectation of compensation or gain, to:

(a) Offer, solicit, broker, directly or indirectly arrange, place, or find a renewable energy facility for a consumer in this State;

(b) Engage in any activity intended to assist a consumer in this State in obtaining a renewable energy facility, including lead generation;

(c) Arrange, in whole or in part, the sale or lease of a renewable energy facility through a third party, regardless of whether approval, acceptance, or ratification by the third party is necessary to create a legal obligation for the third party, through any method, including mail, telephone, Internet, or any electronic means; or

(d) Represent to consumers through advertising or other means of communicating or providing information, including the use of business cards, stationery, brochures, signs, rate lists, or other promotional items, that a person can or will provide a renewable energy facility or any of the services described in subdivisions (a)–(c) of this definition.

(12) “Retail electric provider” includes an electrical utility as defined in Section 58-27-10 and all other entities providing retail electric service in South Carolina regardless of where organized or domiciled.

(13) “Third-party servicer” means a person that enters into a contract with a renewable energy facility retailer to perform the installation, maintenance, or servicing of a facility for a consumer in this State.

B. Marketing

(1) The administrator shall develop a written pamphlet that explains the rights and responsibilities of consumers who are marketed renewable energy facilities. Such pamphlet shall include the names, addresses, and telephone numbers of state agencies responsible for administering and/or enforcing the provisions of Title 37 and Title 58. Such pamphlet shall be given to a consumer at the time of any renewable energy facility solicitation. The administrator shall consult with and seek input from consumer representatives, representatives from the renewable energy facility industry, retail electric providers, and the Office of Regulatory Staff. Each person engaged in the renewable energy facility solicitation shall be responsible for reproducing and distributing the pamphlet finally approved and authorized by the administrator. The pamphlet developed under this subsection shall be provided to consumers beginning three months after the effective date of this regulation.

(2) Persons engaging in lead generation shall clearly and conspicuously include in all advertisements and solicitations of leads, the following statement in bolded typeface at least two points larger than the surrounding typeface or 14-point font, whichever is larger: “This is a solicitation for [insert renewable energy facility type]. [Insert lead generator name] will not provide you with [insert renewable energy facility type]. Instead [insert lead generator name] will share your information with one or more third parties who may contact you to provide [insert renewable energy facility type].”

(3) A person engaging in renewable energy facility solicitations shall not advertise or market to a consumer:

(a) in a manner that is false, deceptive, or misleading, or that misrepresents a renewable energy facility offered for sale or lease, whether by affirmative statement, implication or omission; or

(b) if the retailer or lead generator knows or reasonably should know that the consumer would likely be unable to:

(i) fulfill the terms of a financing agreement for a renewable energy facility; or

(ii) benefit from a renewable energy facility agreement.

(4) Any written marketing material provided to consumers by a person engaging in renewable energy facility solicitations shall:

(a) Be in at least 12-point font;

(b) Be given to the consumer in the same language as any oral representations or solicitations are made;

(c) Contain a provision identifying the name, address, telephone number, and email address of the individual making the renewable energy facility solicitation;

(d) Provide the following disclosures if providing any statement, whether oral or written, regarding the price of the renewable energy facility:

(i) The total price to be paid by the consumer, including any interest, installation fees, document preparation fees, service fees, or other fees;

(ii) Whether maintenance and repairs of the renewable energy facility are included in the total price;

(iii) The consumer's eligibility for or receipt of tax credits or other governmental or retail electric provider incentives, and if a tax credit is applicable, a disclosure of the price before and after the application of the tax credit. If a tax credit or rebate is indicated as part of an advertised price, the tax credit or rebate must be one that is available to the majority of the general buying public. If the tax credit or rebate is not available to the majority of the general buying public, it may not be figured in the advertised price. The amount of the tax credit or rebate may be listed as an additional incentive to those who qualify.

(e) Provide a description of any warranty, representation, or guarantee of energy production of the system;

(f) Provide the following disclosures in writing if giving any estimate of the savings a consumer is projected to realize from the facility, whether oral or written:

(i) The estimated projected savings over the life of the renewable energy facility agreement;

(ii) Any material assumptions used to calculate estimated projected savings and the source of those assumptions, including:

(A) If a change in the retail electric provider's annual electricity rate is assumed, the rate of the change and the retailer's basis for the assumption of the change;

(B) The consumer's eligibility for or receipt of tax credits or other governmental or retail electric provider incentives;

(C) Facility production data, including production degradation;

(D) The facility's eligibility for interconnection under any net metering or similar program;

(E) The consumer's electrical usage and the facility's designed offset of the electrical usage;

(F) Historical retail electric provider costs paid by the consumer, to include a period of not less than twelve months;

(G) Any escalation affecting a payment between the consumer and the retailer; and

(H) The costs associated with replacing equipment making up part of the facility or, if those costs are not assumed, a statement indicating that those costs are not assumed.

(g) Include two separate statements in bolded typeface at least two points larger than the surrounding typeface or 14-point font, whichever is larger, in close proximity to any written estimate of projected savings:

(i) "This is a quote. Your power company's rate for [insert renewable energy facility type] may be different from your current rate. Rates may go up or down and the money you may save, if any, may vary. Past data may not be a good gauge of future results. For more information about rates, contact your power company."; and

(ii) "Tax and credits or incentives including those provided by federal, state, or local governments may change or end. This can impact the amount of money you might save. Consult a tax professional to understand any tax liability or eligibility for any tax credits that may result from the purchase of your [insert renewable energy facility type]."

C. Agreements

(1) Before entering an agreement, a retailer shall provide to a consumer a written copy of the agreement as provided in this section. The agreement must be presented to the consumer no less than seven calendar days before formal signing of the agreement by both parties. If any substantive changes are made to the terms of the agreement, the consumer must be given a new agreement for review and the seven-day pre-signing period restarts.

(2) The administrator, in consultation with the Office of Regulatory Staff, consumer representatives, conservation representatives, renewable energy facility industry members and retail electric providers, shall develop a standard agreement that sets forth required disclosures and provisions. Retailers shall provide the standard agreement developed under this subsection to consumers beginning three months after the effective date of this regulation.

(3) The agreement shall, at a minimum:

(a) Be in at least 12-point font;

(b) Be given to a consumer in the same language as the sales offer was presented;

(c) Be separately signed and dated by the consumer and the retailer;

(d) Contain:

(i) The name, address, telephone number, and any email address of the consumer;

(ii) The name, address, telephone number, and email address of the retailer;

(iii) The name, address, telephone number, and email address of the lead generation company and individual used by the retailer, if applicable;

(iv) The name, address, telephone number, and email address of:

(A) the person that is expected to install the facility that is the subject of the agreement;

(B) the person that is expected to maintain or otherwise service the facility that is the subject of the agreement; and

(C) the retailer's representative the consumer should contact to file a complaint about the renewable energy facility;

(v) The following statement in bolded typeface at least two points larger than the surrounding typeface or 14-point font, whichever is larger, immediately above a section for the consumer to sign and date acknowledging receipt of the agreement and commencement of the seven-day pre-signing period: "This is a contract to [insert agreement type] [insert renewable energy facility type]. The contract cannot be signed for seven days. During this time, you should read it fully and seek help in understanding its terms. You may want to discuss this contract with your power company and homeowner's association prior to signing it. You may also wish to shop around and compare the terms with other companies or systems.";

(vi) A provision notifying the consumer of the right to cancel as set forth in this regulation;

(vii) A statement indicating the nature of the transaction:

(A) If the renewable energy facility will be leased, the written statement must include a disclosure, in bold font, stating the following: "You are entering into a contract to lease a [insert renewable energy facility type]. You will lease (not own) the facility that is installed."

(B) If the renewable energy facility will be purchased, the written statement must include a disclosure, in bold font, stating the following: "You are entering into a contract to purchase a [insert renewable energy facility type]. You will own (not lease) the facility that is installed."

(viii) The total price to be paid by the consumer, including any interest, installation fees, document preparation fees, service fees, or other fees;

(ix) If financing the purchase of the renewable energy facility through the retailer or an affiliate thereof, the total amount financed, the total number of payments, the payment frequency, the amount of payment expressed in dollars, the payment due dates and the applicable annual percentage rate;

(x) If leasing the renewable energy facility through the retailer or an affiliate thereof, a payment schedule, including any amounts owed at contract signing, at the commencement of installation, at the completion of installation, and any final payments. If the renewable energy facility is being leased, the written statement must include the frequency and amount of each payment due under the lease and the total estimated lease payments over the term of the lease;

(xi) A description of any one-time or recurring fees, including, but not limited to, estimated system removal fees, maintenance fees, payments for replacement of system components likely to require replacement before the end of the useful life of the system as a whole, Internet connection fees, and automated clearinghouse fees. If delinquency charges may apply, the description must describe the circumstances triggering such delinquency charges;

(xii) A statement describing the facility and indicating the facility design assumptions. The description should include, but is not limited to, the make and model of the facility and related components, system size, estimated energy production, cost-per-watt, position of the facility and its components on the consumer's property, and estimated annual energy production degradation, including the overall percentage degradation over the term of the agreement or, at the retailer's option, over the estimated useful life of the system;

(xiii) The approximate start and completion dates for the installation of the renewable energy facility;

(xiv) If the retailer provides any oral or written estimate of the savings the consumer is projected to realize from the facility:

(A) The estimated projected savings over the life of the renewable energy facility agreement;

(B) If a consumer is participating in a net energy metering program pursuant to Title 58, Chapter 40, a disclosure stating the consumer may only be eligible for one-to-one net metering credits until May 21, 2029;

(C) If a consumer enters into a renewable energy facility agreement on or after June 1, 2021, and if applicable, a disclosure stating solar choice metering tariffs will be offered in lieu of one-to-one net metering credits;

(D) Any material assumptions used to calculate estimated projected savings and the source of those assumptions, including:

(1) If a change in the retail electric provider's annual electricity rate is assumed, the rate of the change and the renewable energy facility retailer's basis for the assumption of the rate change;

(2) The consumer's eligibility for or receipt of tax credits or other governmental or retail electric provider incentives, and if a tax credit is applicable, a disclosure of the price before and after the application of the tax credit. If a tax credit or rebate is indicated as part of a price, the tax credit or rebate must be one that is available to the majority of the general buying public. If the tax credit or rebate is not available to the majority of the general buying public, it may not be figured in the advertised price. The amount of the tax credit or rebate may be listed as an additional incentive to those who qualify;

(3) Renewable energy facility production data, including production degradation;

(4) The facility's eligibility for interconnection under any net metering or similar program;

(5) The consumer's electrical usage and the facility's designed offset of the electrical usage;

(6) Historical retail electric provider costs paid by the consumer, to include a period of not less than twelve months;

(7) Any escalation affecting a payment between the consumer and the retailer; and

(8) The costs associated with replacing equipment making up part of the facility or, if those costs are not assumed, a statement indicating that those costs are not assumed.

(E) Two separate statements in bolded typeface at least two points larger than the surrounding typeface or 14-point font, whichever is larger, in close proximity to any written estimate of projected savings:

(1) "This is a quote. Your power company's rate for [insert renewable energy facility type] may be different from your current rate. Rates may go up or down and the money you may save, if any, may vary. Past data may not be a good gauge of future results. For more information about rates, contact your power company."; and

(2) "Tax and credits or incentives including those provided by federal, state, or local governments may change or end. This can impact the amount of money you might save. Consult a tax professional to understand any tax liability or eligibility for any tax credits that may result from the purchase of your [insert renewable energy facility type]."

(xv) A description of any warranty, representation, or guarantee of energy production of the facility;

(xvi) A disclosure as to whether maintenance and repairs of the renewable energy facility are included in the total price;

(xvii) A statement of whether the retailer will make a fixture filing or other notice in the county real property records covering the facility and any fees or other costs associated with the filing that may be charged to the consumer;

(xviii) A disclosure identifying whether the agreement contains any restrictions on the consumer's ability to modify or transfer ownership of the facility, including whether any modification to transfer is subject to review or approval by a third party;

(xix) A disclosure notifying the consumer of the party responsible for obtaining interconnection approval from the retail electric provider;

(xx) A description of how the retailer will protect consumer data privacy and security; and

(xxi) A blank section that allows the retailer to provide additional relevant disclosures or explain disclosures made elsewhere in the disclosure form.

(4) A copy of the fully and completely filled in and executed agreement must be provided to the consumer.

(5) Any finance agreement for a loan, lease, or retail installment sales contract offered by or through the retailer must be a separate addendum to the renewable energy facility agreement. The finance agreement must comply with all applicable state and federal laws.

D. Right to Cancel

(1) In addition to any right otherwise to revoke an offer, the consumer may cancel an agreement until midnight of the third business day after the day on which the consumer signs an agreement which complies with applicable laws. Information and notices that comply with S.C. Code Title 37, Chapter 2, Part 5 or 16 C.F.R. Part 429 shall be deemed compliant with this subsection.

(2) Notwithstanding the three-day right to cancel set forth above, the enforceability of an agreement is contingent upon issuance of a building permit by the local government authority and approval by the consumer's homeowner's association, if applicable. If a local government authority denies the building permit or the consumer's homeowner's association does not approve the installation, a consumer may, within seven calendar days of receiving notice:

(a) Cancel the renewable energy facility agreement upon payment of reasonable cancellation costs or fees; or

(b) Agree to amend the terms of the agreement with the retailer and resubmit the proposal for approval by the local government authority and/or the consumer's homeowner's association. In this circumstance, all applicable requirements set forth in Sections B and C of this regulation apply, including the seven-day pre-signing period.

E. Due Diligence Requirements

(1) A retailer shall not enter into a contract with a third-party servicer the retailer knows or reasonably should know is unlikely to fulfill the material terms of the contract.

(2) A retailer shall be responsible for verifying a third-party servicer understands and is capable of complying with all material terms and provisions stated in the renewable energy facility agreement relating to the installation, maintenance, and/or servicing of a renewable energy facility.

(3) Construction or installation of a renewable energy facility shall not commence until a local government authority has issued the building permit.

F. Recordkeeping

(1) A person that engages in renewable energy facility solicitation or enters into agreements shall maintain at the person's usual place of business books, records, and documents pertaining to the business conducted.

(2) To enable the administrator to determine compliance with this and other related regulations and applicable laws, at a minimum the following records shall be maintained for not less than three years:

(a) Copies of all agreements entered into with residents of this State;

(b) Copies of all solicitation materials used in its business, regardless of medium, including business cards, telephone scripts, mailers, electronic mail, and radio, television, and Internet advertisements;

(c) Records of any contact or attempted contact with a consumer, including the name, date, method, and nature of contact, and any information provided to or received from the consumer; and

(d) The name, address, and, if applicable, unique identifier of any person who received, requested, or contracted for leads or referrals and any fees or consideration charged or received for such services.

G. Electronic Delivery of Documents

(1) The requirement to provide a written document under this section may be satisfied by the electronic delivery of the document if the intended recipient provides prior consent to receive the document electronically and affirmatively acknowledges its receipt.

(2) An electronic document satisfies the font and other formatting standards required for a written document if the format and the relative size of characters of the electronic document are reasonably similar to those required in the written document or if the information is otherwise displayed in a reasonably conspicuous manner.

(3) All electronic documents and signatures are subject to compliance with the Uniform Electronic Transactions Act, Section 26-6-10 *et seq.*, and the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Chapter 96.

H. Remedies

(1) The administrator, upon finding a violation of Title 37 or this regulation, may issue an administrative order requiring the person to cease and desist, return property or money received in violation of Title 37 or this regulation, and pay penalties of up to five thousand dollars for each violation. The Department of Consumer Affairs may bring a civil action seeking similar relief, including to restrain any person from violating Title 37 or this regulation and for other appropriate relief including but not limited to: preventing a person from using or employing prohibited practices, reforming contracts to conform to Title 37 or this regulation, and rescinding contracts into which a person has induced a consumer to enter by conduct violating Title 37 or this regulation even though a consumer is not a party to the action. Monies received in enforcement of this regulation shall be retained by the Department of Consumer Affairs.

(2) The remedial provisions of this regulation are cumulative of and in addition to any other action at law and any other action taken by the Department of Consumer Affairs pursuant to Title 37.